Supreme Court, U.S.
FILED

961868 APR 30 1997

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

October Term, 1996

JOHNNY GOLDTOOTH,

Petitioner,

v.

MERIT SYSTEM PROTECTION BOARD,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Patterson V. Joe
PATTERSON V. JOE, P.C.
Attorney for Petitioner
1838 West University
Heights Drive South
Flagstaff, Arizona 86001
(520) 779-9119

4 1PP

QUESTION PRESENTED

Was the Merit System Protection Board's denial of Mr. Johnny Goldtooth's petition for waiver of regulation in favor of defendant/appellee and against plaintiff/appellant holding that Mr. Goldtooth failed to demonstrate the due diligence necessary for the Board's waiver of its filing deadline an abuse of the Board's discretion?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 5

THE MSPB ABUSED ITS DISCRETION BY MISINTERPRETING AND MISCHARACTERIZING THE PETITIONER'S C'RCUMSTANCES 5

CONCLUSION 9

TABLE OF CITATIONS

Cases Cited: Page

Goldtooth v. Merit System Protection Board, 106 F. 3d 427 (Fed. Cir. 1997) 2

Pyles v. Merit System Protection Board, 45 F. 3d 411 (Fed. Cir. 1995) 5

Mendoza v. Merit System Protection Board, 949 F. 2d 391 (Fed. Cir., 1991) 6

Powell v. Zuckert, 366 F. 2d 634 (D.C. Cir. 1966) 7, 8

Statutes Cited:

28 U.S.C. Section 1254(1) 2

Other Authorities Cited:

5 C.F.R. Section 1201.115 5

APPENDIX

Appendix A - Decision of the U. S. Court of Appeals for the Federal Circuit 1a

Appendix B - Final Opinion and Order of Merit System Protection Board 12a

Appendix C - Initial Decision of Merit System Protection Board 21a

Appendix D - Affidavit of Johnny Goldtooth 26a

No.

In the

Supreme Court of the United States

October Term, 1996

JOHNNY GOLDTOOTH,

Petitioner,

v

MERIT SYSTEM PROTECTION BOARD,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, Johnny Goldtooth, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINION BELOW

The unpublished opinion of the Court of Appeals for the

Federal Circuit is reported at 106 F. 3d 427 and is reproduced in the Appendix filed herewith ("App") at 1a. The final and initial opinions of the Merit System Protection Board in this case are reproduced at 12a and 21a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit rendered its judgment on January 30, 1997. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The Appellant, Mr. Johnny Goldtooth is a Navajo Indian residing on the Navajo reservation near a community called Teesto, Arizona. Mr. Goldtooth, currently over 55 years of age, was employed as a bus driver for the Bureau of Indian Affairs, Department of Interior, at the Seba Dalkai Boarding School starting on January 4, 1985.

Mr. Goldtooth attained only a sixth grade level formal education. He has lived all of his life on the Navajo reservation where the dominant language spoken is Navajo. Mr. Goldtooth has also lived a predominantly traditional Navajo lifestyle. Because of his limited education, Mr. Goldtooth has difficulty understanding oral and written English. As a result, Mr. Goldtooth has to rely on the assistance of others to communicate with English-speaking people.

As a motor vehicle operator, Mr. Goldtooth drove a school bus to pick up school children in the morning and return them in the afternoon. On October 4, 1993, while Mr. Goldtooth was driving the school bus, Janice Yazzie, a 12-year-old female student who was a passenger on Mr. Goldtooth's bus walked up to Mr. Goldtooth's seat. Ms. Yazzie then kneeled and leaned over Mr. Goldtooth's lap, and began changing the channel on the radio while the bus was in motion.

At this point, Mr. Goldtooth grabbed Ms. Yazzie's right shoulder, pulled her away from the radio and himself, and firmly

instructed her not to walk around while the bus was moving and not to play with the radio. Ms. Yazzie attempted to play with the radio for about three days. Each time, Mr. Goldtooth had to firmly instruct Ms. Yazzie to sit and not walk around while the bus was in motion.

Between October 4 and 18, 1993, Kimberly Horsechief, another 12-year-old female student who was a close friend of Janice Yazzie, began running around on top of the bus seats while the school bus was in motion and while Mr. Goldtooth was the bus driver. Although Mr. Goldtooth admonished Ms. Horsechief not to run around on the bus seats, Ms. Horsechief continued to do so while the bus was in motion. Because of Ms. Horsechief's conduct, Mr. Goldtooth stopped the bus, walked over to Ms. Horsechief, held her right arm and told her to sit. Ms. Horsechief did not sit. Mr. Goldtooth then grabbed both of Ms. Horsechief's shoulders and sat her down on the seat she was standing.

On October 18, 1993, the principal summoned Mr. Goldtooth to his office. Upon his arrival at the principal's office, the principal informed Mr. Goldtooth that Ms. Janice Yazzie and her mother had complained that Mr. Goldtooth had "touched" Ms. Yazzie. Dr. Calsoyas, the principal, then asked Mr. Goldtooth if he had touched Ms. Yazzie and Ms. Horsechief. Mr. Goldtooth answered positively because he had touched their shoulders or arms. Mr. Goldtooth was not aware that when the principal said "touch," he meant touching the students on the breasts, hugging the student, or some other improper contact.

The principal then presented a type written statement dated October 18, 1993 to Mr. Goldtooth for his signature. The principal stated that the typed memorandum was for reassigning Mr. Goldtooth to facility maintenance duties. The principal also stated that he would help Mr. Goldtooth find an attorney; that he had much respect for Mr. Goldtooth; and that all Mr. Goldtooth needed to do was sign the October 18, 1993 statement. The principal then instructed Mr. Goldtooth to avoid all children and facilities where children stay.

On May 9, 1994, Dr. Kyril Calsoyas, Principal for the Seba Dalkai Boarding School, rated Mr. Goldtooth's employee performance as a level three from July 1993 to June 1994. The Boarding School interprets a level three rating as "overall, performance is fully successful." On September 6, 1994, the principal wrote a letter to Mr. Goldtooth advising Mr. Goldtooth of the principal's intention to remove Mr. Goldtooth from his position. The September 6, 1994 letter advised Mr. Goldtooth that he had 10 days to submit a response.

Mr. Goldtooth then completed and submitted a Local Complaint Form with the National Federation of Federal Employees (hereinafter, "NFFE") on September 8, 1994. Shortly after that, the NFFE returned Mr. Goldtooth's documents to him.

On November 4, 1993, Charles Johnson, the Agency Superintendent for Education wrote to Mr. Goldtooth informing Mr. Goldtooth of his removal from his position effective November 18, 1994.

Peggy Scott, a relative of Mr. Goldtooth mailed a completed Merit System Protection Board Appeal form, a letter addressed to the MSPB appealing the removal, and attachments to Benjamin C. Smith, BIA/NFFE Council representative on December 9, 1994. The NFFE took no action for Mr. Goldtooth. The completed MSPB Appeal form, letter and attachment did not reach the MSPB.

Mr. Goldtooth filed his notice of appeal and request for waiver of regulation on May 23, 1995. On July 21, 1995, the San Francisco Regional Office of the MSPB issued its initial decision dismissing Mr. Goldtooth's appeal as untimely. Mr. Goldtooth then filed his petition for review with the Merit System Protection Board ("Board") on August 25, 1995. On March 5, 1996, the Board issued its final decision denying Mr. Goldtooth's petition for review. Mr. Goldtooth then filed his petition for review with the U. S. Court of Appeals for the Federal Circuit on April 2, 1996. On January 30, 1997, the Court of Appeals affirmed the decision of the Board.

REASON FOR GRANTING THE WRIT

THE MSPB HAS ABUSED ITS DISCRETION BY MISINTERPRETING AND MISCHARACTERIZING THE PETITIONER'S DUE DILIGENCE

This court should grant the writ because the Federal Circuit has decided an important question of federal law that has not been, but should be settled by this Court. The federal law in question here concerns the administrative waiver of employment termination appeal time limitations. The Court of Appeals for the Federal Circuit in this case unduly limits a petitioner's ability to appeal his employment termination despite a showing of good cause for a delay in filing his appeal. The Federal Circuit denied Mr. Goldtooth's request to reverse the Board's denial of a waiver of the appeal time regulation because the Federal Circuit did not believe that Mr. Goldtooth met the criteria set forth at 5 CFR Section 1201.115. The Federal Circuit states that Mr. Goldtooth did not demonstrate the required due diligence in pursing his appeal during the period between January 1995 and May 23, 1995 (the date of the appeal).

This court has not yet had an opportunity to review and address the cases decided by the various circuit courts on this issue. Because there are no definitive guideposts in this area of the law, the circuit courts are left to create their own standards and exceptions. In some cases, the circuit courts are more willing to make certain exceptions. For instance, in Pyles v. Merit System Protection Board, 45 F. 3d 411 (Fed. Cir., 1995), the Federal Circuit reversed a decision of the Board dismissing an appeal as untimely when the appellant filed her appeal 19 months late.. In the Pyles case, the court found that there was no substantial evidence to support a finding that the appellant did not suffer from dementia between August 1992 and November 1993 when the appeal was filed. The Board assumed that the appellant was not suffering from dementia during that period of time and denied appellant's petition to waive the appeal time limitation. The court ruled that the Board's assumption was not based on substantial evidence and therefore was an abuse of discretion. In other cases, like the instant

case, petitioners are left without any recourse.

The Merit System Protection Board's decision to deny Mr. Goldtooth's petition for waiver to time limitations was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In deciding whether to waive the time limits, the Board must consider several factors. Factors to be considered include: the length of the delay; whether the appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his or her ability to comply with the time limit; the degree to which negligence by the appellant was shown to be present or absent; circumstances which show that any neglect involved is excusable; a showing of unavoidable casualty or misfortune; and the extent and nature of prejudice to the agency which would result from waiver of the time limit. Mendoza v. Merit System Protection Board, 949 F. 2d 391, 393 (Fed. Cir., 1991).

The Federal Circuit's decision ("Decision") to affirm the Board's decision over simplifies and misconstrues Mr. Goldtooth's circumstances. The Decision states that "it would have been relatively simple for [the Petitioner] to put the application on file, perhaps with the assistance of Ms. Scott, and then look for an attorney." For someone who has more than a sixth grade education, who lives in a metropolitan area, and whose primary language is English, finding the proper mailing address, addressing a package, and mailing it is not difficult. For a person with a minimal formal education, a non-English primary language, and a remote and rural home, it is more difficult to address and mail a package. A person in such a situation lives day to day in circumstances which are beyond his control.

Secondly, in Mr. Goldtooth's situation, he attempted to appeal his termination. He did not sit back and do nothing. Mr. Goldtooth's relative, Ms. Peggy Scott, prepared an appeal form and cover letter. Ms. Scott mailed the package to Mr. Benjamin Smith believing that was the proper thing to do. When Ms. Scott mailed the appeal package, Mr. Goldtooth believed that his appeal was filed. We know now that Ms. Scott mailed the appeal package to the wrong person and that it did not

get to the MSPB. After Ms. Scott mailed the appeal package to Mr. Smith, Mr. Goldtooth repeatedly attempted to reach Mr. Smith by telephone. Mr. Goldtooth was unsuccessful in reaching Mr. Smith for several weeks. After reaching Mr. Smith, Mr. Goldtooth discovered that they did not file his appeal.

Finally, the Decision over simplifies Mr. Goldtooth's efforts to retain an attorney to press his appeal and again fails to appreciate Mr. Goldtooth's circumstances. The Decision states: "The record indicates Mr. Goldtooth visited only two attorneys during these four months. Even given the distance for Mr. Goldtooth to travel, it is reasonable to consider such a lack of effort not diligent." Mr. Goldtooth's affidavit at paragraph 39 described making an appointment at the DNA Legal Services office and being asked to return in two or more weeks. The legal services office was in Window Rock, Arizona which is about 2 ½ hours away over dirt and paved roads from Mr. Goldtooth's home. Paragraph 39 of Mr. Goldtooth's Affidavit also stated that when Mr. Goldtooth appeared for his appointment, the legal services office informed him that the legal services office could not represent him.

Mr. Goldtooth affied that he then went to Gallup, New Mexico to try to retain an attorney. After visiting with several attorney offices, Mr. Goldtooth was still not able to retain an attorney. Not finding an attorney in either Window Rock, Arizona and Gallup, New Mexico Mr. Goldtooth then began searching for an attorney in Flagstaff, Arizona. The distance from Mr. Goldtooth's home to Flagstaff, Arizona is about 2 hours again over dirt and paved roads.

In Powell v. Zuckert, 366 F 2d 634 (1966), the Court held that the appellant was due diligent in seeking and retaining legal assistance even though it took the appellant sixteen months to file his notice of appeal. In Powell, the Court stated: "Courts have recognized that special circumstances may intervene and make the institution of litigation more difficult, and have judged the question of laches in terms of the particular plaintiff's diligence in overcoming the resulting barriers." Powell at p. 637.

After a denial of an appeal by the Civil Service Commission in April of 1963, the appellant and his father set out to find and retain an attorney. The appellant and his father made numerous attempts to secure legal assistance from individual attorneys, legal aid agencies, and the San Francisco Bar Association's Lawyer Referral Service. Some attorneys contacted considered the case merit less. Others wanted cash in advance. The legal aid agencies contacted had too large a backlog of cases. The appellant did not find a lawyer until April 1964 and the appeal was filed in August 1964.

Based on the following facts, the Court determined that the appellant was not a person who slept on his rights. Similarly, Mr. Goldtooth did not sleep on his rights either. In Powell, the appellant had very limited financial resources. In the present matter, Mr. Goldtooth's obstacles are his limited education and his geographic isolation.

By reviewing the record, one can understand that Mr. Goldtooth could not have just picked up the telephone and made several appointments to interview several lawyers. Likewise, Mr. Goldtooth could not just get in his car and visit several attorneys in a few minutes. By understanding Mr. Goldtooth's geographic isolation, one can understand that visiting one or more attorneys in Gallup or Flagstaff was a major undertaking. Consequently, Mr. Goldtooth's contacts with one or more attorneys were completed in a time frame greater than someone who lives in a metropolitan area with modern conveniences like a telephone and ready access to several different attorneys nearby.

Mr. Goldtooth therefore had two major circumstances which severely affected his ability to appeal on time. The first major circumstance is his limited formal education. The second major circumstance is his geographic location and isolation. Both circumstances are beyond the control of Mr. Goldtooth and contributed to his inability to file his appeal on time. Both circumstances caused Mr. Goldtooth to take more time to file his appeal.

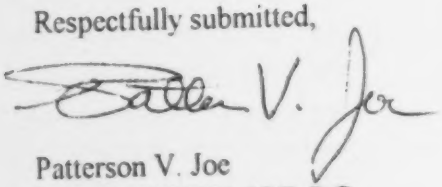
The Department of Interior ("Department") has failed to

controvert any of the proof regarding Mr. Goldtooth's obstacles. In addition, the Department has failed to show the extent and nature of prejudice to it from waiver of the time limitation. Indeed, the Department has not alleged any prejudice that would result if the time limit were waived.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,



Patterson V. Joe
PATTERSON V. JOE, P.C.
Attorney for Petitioner
1838 W. University Heights
Drive South
Flagstaff, Arizona 86001
(520) 779-9119

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED JANUARY 30, 1997.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-3215

JOHNNY GOLDTOOTH,

Petitioner,

V.

MERIT SYSTEM PROTECTION BOARD,

Respondent.

DECIDED: January 30, 1997

Before NEWMAN, MICHEL, and SCHALL, Circuit Judges.

Opinion for the court filed by Circuit Judge SCHALL. Dissenting opinion filed by Circuit Judge NEWMAN.

SCHALL, Circuit Judge

DECISION

Johnny Goldtooth petitions for review from the March 5, 1996 final decision of the Merit Systems Protection Board

(Board) in Goldtooth v. Department of the Interior 69 M.S.P.R. 662 (1996). The July 21, 1995 initial decision of the Administrative Judge (AJ) dismissing Mr. Goldtooth's appeal as untimely became the final decision of the Board on March 5, 1996 pursuant to 5 C.F.R. Section 1201.113(b) when the Board denied Mr. Goldtooth's petition for review. We affirm.

DISCUSSION

Mr. Goldtooth is a fifty-five year old Navajo Indian, who lives on the Navajo reservation near Teesto, Arizona. The dominant language on the reservation is Navajo and Mr. Goldtooth has attained only a sixth-grade education. Therefore, he has difficulty speaking and writing English and relies on others to assist him in communicating with English-speaking people. Mr. Goldtooth worked as a school bus driver for the Buruea of Indian Affairs, Department of the Interior (agency) at a nearby school.

Effective November 18, 1994, the agency removed Mr. Goldtooth from his position based upon a charge of misconduct involving two students of the school. Mr. Goldtooth was informed of his right to appeal to the Board. Pursuant to 5 C.F.R. Section 1201.22(b), he had thirty days within which to file the appeal. The notice of removal also informed Mr. Goldtooth that, in the alternative, he could appeal the removal action through negotiated grievance procedures by contacting Mr. Benjamin C. Smith of the National Federation of Federal Employees Council.

Mr. Goldtooth asked a relative, Ms. Peggy Scott, to complete the appeal form and to write a cover letter to the Board. Mr. Goldtooth also contacted Mr. Smith and sought his assistance. Mr. Smith agreed to call Mr. Goldtooth to arrange

a meeting, and he instructed Mr. Goldtooth to bring his appeal form and cover letter to the meeting. However, Mr. Smith never called, and Mr. Goldtooth's attempts to reach him were fruitless. Eventually, on December 9, 1994, Ms. Scott mailed the appeal form and letter to Mr. Smith. Mr. Goldtooth continued to try to reach Mr. Smith but was unsuccessful in his efforts. The appeal form and letter never reached the Board. Mr. Goldtooth first learned in January of 1995 that his appeal materials had not been filed.

Thereafter, Mr. Goldtooth sought legal assistance to file his appeal, but his efforts were hampered because the nearest attorneys were located two to two and a half hours away. After being denied assistance from a legal services office in Window Rock, Arizona, and from at least one attorney whom he visited in Gallup, New Mexico, he finally retained counsel in Flagstaff, Arizona. His appeal was filed on May 23, 1995 over five months after it was due.

In her initial decision, the AJ found the appeal untimely under 5 C.F.R. Section 1201.22(b). In addition, the AJ determined that Mr. Goldtooth had not shown good cause for his delay. The AJ concluded that, to the extent either Mr. Smith misled Mr. Goldtooth, or Mr. Goldtooth misunderstood Mr. Smith's instruction, he did not establish good cause. The AJ noted that after Mr. Goldtooth learned that Mr. Smith had not filed the appeal, he made no attempt to mail the form himself or to enlist Ms. Scott's help.

On petition for review, the Board, in a split 2-1 decision, reasoned that Mr. Goldtooth may have been diligent in his efforts until January of 1995, when he learned that Mr. Smith had not filed his appeal. The Board concluded, however, that for the period between January and May 23, 1995 (when the

appeal was filed), his efforts at obtaining legal assistance did not amount to due diligence sufficient for purposes of waiving the filing deadline. Therefore, the Board denied Mr. Goldtooth's petition for review.

This court must affirm the Board's decision unless Mr. Goldtooth establishes that it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed, or (3) unsupported by substantial evidence. 5 U.S.C. Section 7703© (1994).

No dispute exists that Mr. Goldtooth did not timely file his appeal under 5 C.F.R. Section 1201.22(b), and therefore the only issue is whether the deadline should have been waived for good cause under 5 C.F.R. Section 1201.22(c). Upon a showing of good cause by the petitioner, a filing deadline may be waived absent a showing of substantial prejudice to the agency caused by the delay in filing. Pyles v. Merit System Protection Board, 45 F. 3d 411, 414 (Fed. Cir. 1995). However, we have "often stated that whether the regulatory time limit for an appeal (to the Board) should be waived based upon a showing of good cause is a matter committed to the Board's discretion and (we) . . . will not substitute (our) own judgment for that of the Board." Id, (quoting Mendoza v. Merit Systems Protection Board, 966 F. 2d 650, 653 (Fed. Cir., 1992) (in banc)).

As noted above, the Board found that Mr. Goldtooth did not act diligently after he learned that his appeal had not been filed. Mr. Goldtooth argues on appeal that his special circumstances, especially his limited education, lack of facility

with English, and geographic isolation, contributed to his inability to file the appeal on time. However, the Board fully considered these circumstance in finding that he had failed to establish good cause for the delay.

Mr. Goldtooth relies on Powell v. Zuckert, 366 F. 2d 634 (D.C. Cir. 1966) for the proposition that he did not "sleep on his rights" due to his "limited education and geographic isolation." Powell is inapposite to the present case. In Powell, the Court of Appeals for the District Of Columbia held that the district court erred in finding that Powell's claim, delayed for 16 months, was equitably barred by laches due to Powell's poverty and repeated attempts to find an attorney. 366 F. 2d at 636-638. We have held that cases involving laches are not persuasive with respect to cases involving MSPB regulatory time limits. Phillips v. United States Postal Serv., 695 F. 2d 1389, 1391 (Fed. Cir. 1982) ("Laches is an equitable defense separate from any statutory or regulatory time limitation."). Moreover, Powell's search for a lawyer occurred only after he had pursued the administrative appeal process without a lawyer. Powell required a lawyer to navigate the complicated process of obtaining judicial review in a district court of the administrative decision of the Board of Appeals and Review of the Civil Service Commission. Mr. Goldtooth, by contrast, was not required to navigate a complicated pleading process to file his administrative appeal. The only question then is whether Mr. Goldtooth was diligent in pursuing his appeal under the regulatory time limit.

Considering all the evidence that was before it, we cannot say that the Board abused its discretion in concluding that Mr. Goldtooth did not show good cause for the delay between January and May of 1995 in filing his appeal. The Board has consistently held that inability to find a representative

does not establish good cause for waiver of a filing deadline. DeGraaf v. Department of the Navy, 55 M.S.P.R. 343, 346 (1992); Block v. Defense Logistics Agency, 40 M.S.P.R. 198, 199-200, aff'd. 889 F.2d 1099 (Fed. Cir. 1989). After discovering that Mr. Smith had not filed his appeal, Mr. Goldtooth took over four months to locate counsel and have the appeal filed. We are not prepared to say that it was unreasonable for the Board to take the position that Mr. Goldtooth was not diligent during this period. The record indicates Mr. Goldtooth visited only two attorneys during these four months. Even given the distance for Mr. Goldtooth to travel, it is reasonable to consider such a lack of effort not diligent. Moreover, Mr. Goldtooth's application was completed after it was returned from Mr. Smith, and it would have been relatively simple for him to put the application on file, perhaps with the assistance of Ms. Scott, while he searched for an attorney. The application is designed to be completed by a non-lawyer. *See* Cabellero v. Department of the Army, 59 M.S.P.R. 298, 302 (1993) (inexperience with legal matters not good cause for waiver of the Board's deadlines). Since we will not substitute our own judgment for that of the Board in this type of situation, and since Mr. Goldtooth has not shown that the Board abused its discretion in not waiving the filing deadline, the Board's decision must be affirmed.

No Costs.

NEWMAN, Circuit Judge, dissenting.

I respectfully dissent. The majority opinion, by justifying the refusal of the MSPB to hear Mr. Goldtooth's appeal, points up the failure of the MSPB to perform its

statutory function. Mr. Goldtooth had a reasonable explanation of the delay in filing his appeal to the Board. The MSPB's discretion to waive untimeliness is not standardless, and in this case its failure of exercise was contrary to the purpose of the grant of discretion. As discussed in Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184 (1980), when equity and good conscience require waiver of untimeliness, the Board will exercise its discretion to do so.

The Board was required to consider all of the circumstances: the stigma of the charge on which Mr. Goldtooth was dismissed; the timely preparation of his appeal documents; the critical role of his union representative in failing to file the appeal; the distance of the Navajo Reservation from the nearest city; Mr. Goldtooth's language difficulties; and his diligent search for counsel when he learned that the appeal had not been filed.

When a person is charged with socially abhorrent behavior, the loss of one's job on that ground is viewed as confirmation of the accusation. The charge of improper behavior with schoolgirls is of community concern. Mr. Goldtooth's petition states that his daughters are suffering public ridicule. The denial of an appeal, when the board has discretion to receive the appeal, must take cognizance of such special factors. Perhaps Mr. Goldtooth's actions warranted removal; but to deny him a 'day in court' on the circumstances of this case is a negation of the Board's obligations. When there is a reasonable explanation for tardy filing, and when equity and good conscience warrant a hearing, the Board is authorized to waive untimeliness.

In Alonzo the Board stated that 'any doubt about whether good cause has been shown should be resolved in favor of the appellant." Alonzo, 4 M S.P.R. at 186. This principle has disappeared from the panel majority's analysis. The rulings of the Board majority and the panel majority simply give notice that Alonzo will not be followed, and that untimeliness before the Board is a factor of rigidity and strict construction. Such construction is contrary to legislative intent and precedent. Thus I must, respectfully, dissent from the panel's affirmance of the Board's decision.

The panel majority does not mention the events leading to Mr. Goldtooth's removal. In October 1993 Mr. Goldtooth, driver of a school bus, disciplined two twelve-year-old girls; one girl was walking on top of the seats while the bus was moving, and the other was leaning over the driver's seat in order to play the bus radio. The principal of the school informed Mr. Goldtooth that one of the girls and her mother complained that Mr. Goldtooth had "touched" the girl. Mr. Goldtooth agreed, not knowing that "touched" was a euphemism for inappropriate sexual touching. The principal immediately removed Mr. Goldtooth as bus driver and reassigned him to facility maintenance duties, where his performance was rated as "fully successful." Almost a year after the incident, the school principal gave Mr. Goldtooth notice that he would be removed from employment for "repeated incidents of disgraceful misconduct involving a female student entrusted to his care."

Mr. Goldtooth states by affidavit that he touched the girls' arms and shoulders in efforts to discipline them and get them to sit down. He states that he was unaware that the principal was asking whether he had inappropriate contact with the girls. Mr. Goldtooth states that the allegations and his ensuing removal damaged his character and injured his family in

the community.

Mr. Goldtooth prepared a timely notice of appeal to the MSPB with the assistance of an English-literate cousin. As agreed with his union representative, Mr. Smith, he sent the appeal documents to Mr. Smith for review and mailing to the MSPB. Mr. Smith did not mail the notice of appeal, and did not so inform Mr. Smith had failed to mail the appeal documents. It was quite reasonable for Mr. Goldtooth then to conclude that he needed the assistance of a lawyer to cope with not only the loss of his job but now these additional events and the missed deadline. The Reservation was over two and a half hours' drive from the nearest cities. Mr. Goldtooth made contact with a legal services agency that apparently caused delay and provided no assistance, and he made at least two trips before he found counsel. The appeal reached the MSPB five months after its due date.

The Board and this court postulate that Mr. Goldtooth could have acted without a lawyer, or found a lawyer sooner. Perhaps so. But the question is whether he acted reasonably, and whether he must be deprived of all appeal opportunity: "[P]olicy considerations counsel against dismissals for untimely filing and militate for providing employees with a hearing on the merits of their appeals." Walls v. Merit Sys. Protection Bd., 29 F.3d 1578, 1582 (Fed. Cir. 1994). This policy is set in the authorizing legislation. See Senate Rep. No 969, 95th Cong., 2d Sess. 24, 51 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2746, 2773).

Thus, upon a showing of good cause, waiver of the filing deadline is appropriate absent substantial prejudice to the agency due to the filing delay. Pyles v. Merit Sys. Protection Bd., 45 F.3d 411, 414 (Fed. Cir. 1995); Walls, 29 F.3d at 1584.

Factors to consider in determining whether there was good cause include

> the length of the delay; whether appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his ability to compiy with the time limits; the degree to which negligence by the appellant has been shown to be present or absent; circumstances which show that any neglect involved is excusable neglect; a showing of unavoidable casualty or misfortune; and the extent and nature of the prejudice to the agency which would result from waiver of the time limit.

Walls, 29 F.3d at 1581 (quoting Alonzo, 4 M.S.P.R. at 184). In good cause determinations "broad principles of justice and good conscience' must be applied. Alonzo, 4 M.S.P.R. at 184. Indeed, contrary to the interpretation by the panel majority, the principles stated in Powell v. Zuckert, 366 F. 2d 634 (D.C. Cir. 1966), wherein the court ruled that Mr. Powell was not barred by laches due to his 16-month delay in appealing his dismissal while he sought money to hire an attorney, apply equally to this case. As set forth in Alonzo, 4 M.S.P.R. at 184:

> If the employee gives a reasonable excuse for the delay, such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing.

The administrative judge found that there was "basically no evidence that the appellant's limited education and lack of

facility in English contributed to his untimely filing." That finding is contrary to the record, which showed that Mr. Goldtooth needed and sought assistance from English speakers and writers at every stage. In dissenting from the Board's decision, Vice Chair Slavet stated that:

> Mr. Goldtooth's good faith and persistent attempts to cooperate with the agency, respond to the charges and seek adequate representation combined with his isolation of geography, language, community and culture and the further aggravation of that isolation within his community by the notorious nature of the charges against him, constitute good cause to waive the filing deadline.

Goldtooth, 69 M.S.P.R. at 667.

The issue before the Board was not the merits of the charges: it was simply whether Mr. Goldtooth could get a hearing. The Alonzo standards require no more than a "reasonable excuse," which was undoubtedly presented. Mr. Goldtooth's lack of a formal education and his language difficulties explain his actions in entrusting the filing to his union representative, an action criticized by the panel majority. When the filing deadline was missed, it was surely reasonable for Mr. Goldtooth to think that he needed legal assistance. The personal and community prejudice to the employee due to the nature of the charge, and the absence of any prejudice whatsoever to the other mitigating factors, weigh strongly in favor of waiver. There is no contrary weight. Upon these circumstances the Board did not meet its obligation to exercise its discretion and contemplated by statute. I must dissent from this court's endorsement of the Board's failure to meet its obligation to the system of federal employment.

APPENDIX B - FINAL OPINION AND ORDER OF THE MERIT SYSTEM PROTECTION BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHNNY GOLDTOOTH
APPELLANT,

DOCKET NUMBER
DE-0752-95-0440-I-1

V.

DEPARTMENT OF THE INTERIOR, DATE: Mar. 05, 1996

Patterson V. Joe, Esquire, Flagstaff, Arizona, for the appellant.

Timothy Clani, gallup, New Mexico, for the agency.

BEFORE

Ben I. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

Vice Chair Slavet issues a dissenting opinion.

OPINION AND ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on July 21,

1995, because it does not meet the criteria for review set forth at 5 C.R.R. Section 1201.115.

The Vice Chair, in her dissent, speaks to the unique circumstances that arguably contributed to this appellant filing his appeal late. She would find good cause to waive the filing deadline because of these circumstances and because of the appellant's "repeated efforts to pursue his rights."

We have sympathy for the appellant's situation, and agree, as the dissent points out, that "good cause" to excuse a late filing is "an elastic concept. It entitles the employee to the application of broad equitable principles of justice and good conscience." *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 183-184 (1980). However, we disagree that the facts of the instant case warrant waiver.

There is no dispute that the deadline for filing an appeal was December 18, 1994, and no appeal was received by the Board until May 30, 1995. In explanation of this 5-month delay, the appellant through his attorney submitted an affidavit, *see* Initial Appeal File, Tab 1, Exhibit A, that states in relevant part that:

1. Within the filing deadline the appellant received assistance from his union representative, and had a relative of his fill out the Board's appeal form, with a cover letter for transmittal to the Board.

2. After mailing his appeal materials to his union representative on December 9, 1994, it was "several weeks" before the appellant realized that the representative had never filed the appeal with the Board.

3. The appellant then approached a legal services organization and "one or more attorney offices" seeking

representation but was unable to retain an attorney until "the Spring of 1995."

These statements establish that the appellant made diligent efforts to pursue his appeal, within the time limits the Board requires. Within 10 days of being notified of his removal, the appellant engaged one of his relatives to help him complete an appeal form and discussed his case with his union representaive. His circumstances did not prevent him from diligently pursuing assistance at this stage, as the AJ consistently found. However, in the 4 or 5 months from January to late May of 1995, his efforts at obtaining assistance deteriorated to his contact with a legal service and "one or more attorneys." Only by the broadest of characterizations could this be described as a "persistent attempt" to obtain legal representation and falls far shor of demonstrating the due diligence necessary for the Board's waiver of its filing deadline.

The appellant needed only to place postage on the appeal form that he completed, with the help of his relative, in November 1994, address it to the Board's regional office, and place the envelope in a mail box. Then his appeal would have been timely filed. However, he did not perform this simple act, and his subsequent attempts at obtaining legal representation do not relieve him of the responsibility of filing on time.

This is the Board's final order in this appeal. 5 C.F.R. section 1201.113 (b).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. section 7703 (a) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calender days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. Section 7703 (b) (1).

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF

BETH S. SLAVET, VICE CHAIR
in
Johnny Goldtooth v. Department of the Interior

I respectfully dissent. This care involves an appellant

whose entire life has been spent on an isolated Navajo Reservation, whose primary and only fluent language is Navajo, and who, because of these unalterable and unique conditions, was frustrated in repeated attempts to pursue his appeal rights. I believe that the congruence of highly unusual facts here warrants the exercise of the Board's discretion to find good cause to excuse the appellant's delay in filing.

Appellant Johnny Goldtooth, a school busdriver for the Seba Dalkai Boarding School, was removed by the agency form his position for "repeated incidents of disgraceful misconduct involving a female student entrusted to his care." (Initial appeal File (IAF) Tab 1, Exhibit E).

When Mr. Goldtooth learned of the allegations of disgraceful conduct, he quickly indicated his intention to the agency to clear his name. However, despite his good faith efforts, he failed to respond to the agency proposal. First, he relied to his detriment on the union representative"s advice that there was no need to respond to the agency's removal proposal because he had not yet been removed. (IAF, Tab 1, Ex A) Second, having received assurances from the school principal of assistance in finding an attorney, he was lulled into not immediately challenging the proposal. (Id. And Supra, Exhibit H) Finally. He was frustrated from preparing any defense by an agency memorandum directing him to refrain from contacting students and relatives of students pending the outcome of the agency's investigation. (Supra, Exhibits A, B, and G) Having received neither a written nor an oral response from the Appellant, the agency proceeded to inform him of its intent to remove him on November 18, 1994.

The need for a formal response to the agency placed Mr. Goldtooth under a burden far beyond what most appellants face.

Mr. Goldtooth has lived all his life on the Navajo Reservation in Windlow (sic), Arizona. (IAF, Tab 1 Exhibit F) the reservation is two hours by car over dirt and paved roads to the nearest town of Tuba City, Arizona and 2½ to 3 hours' drive over dirt and paved roads to Window Rock, Arizona and Gallup, New Mexico where legal counsel *may* be attainable. (IAF, Tab 1, Ex. A and Petition for Review File, Tab 1.) Mr. Goldtooth has no telephone service, either to his residence or in some nearby location. The dominant spoken language on the reservation is Navajo and Navajo is the appellant's primary language. He has a limited 6th grade education and has difficulty understanding oral *and* written English. (IAF, Tab 1, Exhibit A.[1])

Knowing his severe limitations in speaking and understanding English, Mr. Goldtooth sought the assistance of a relative in drafting an appeal from the agency's proposal to remove him. With that help, Mr. Goldtooth signed and dated an MSPB appeal form on November 16--two days prior to the proposed removal date. His relative mailed the appeal letter, the appeal form and supporting materials to the Council Representative for the Bureau of Indian Affairs/National Federation of Federal Employees, Benjamin Smith, to whom the appellant had spoken about filing an MSPB appeal for Mr. Smith, to review and then file. These materials wee mailed to Smith on December 9--in a manner and time frame that would easily have accommodated a timely filing by Smith of Mr. Goldtooth's appeal by December 18--its due date. (See ID at

---

[1]Indeed, according to the appellant's affidavit, his inability to understand and communicate with the agency led the agency to believe that he admitted the misconduct of which he was accused. Id. At2.

3) However, despite unsuccessful attempts to contact Smith regarding the appeal, Mr. Goldtooth only learned several weeks after the due date of his appeal that Mr. Smith had not filed his appeal.

Under the isolating conditions cited above, Mr. Goldtooth immediately began a search for a new representative. He went to the DNA Peoples' Legal Service, Inc. In Window Rock, 2½ hours away, and made an appointment to see an attorney. Approximately two weeks later, when the appellant returned for his appointment, he was told that the individual with whom he had the appointment could not see him and the DNA could not take his case. Mr. Goldtooth persisted in his search for representation but was unable to find any assistance until the spring of 1995, when he finally obtained legal counsel in Flagstaff, Arizona.

Time limits for the filing of appeals are not prescribed by statute. Instead they are created by the Board under its authority to promulgate regulations. In this regard, Congress has granted the Board wide discretion in the area of timeliness of appeals. In establishing the time limits for appeals, the Board provided that an appeal would be dismissed as untimely filed "unless a good reason for the delay is shown." 5 C.F.R. Sec. 1201,22(c). The Board may find good cause when a party shows that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The Board also held in *Alonzo* that favor of the appellant." ID. at 186. I believe that Mr. Goldtooth has shown that he exercised diligence in pursuing his appeal in the context of the exception barriers which impeded every step of his way. He has presented sufficient evidence to resolve any doubts in his favor.

As noted above, this Native American appellant lives on a Navajo reservation. He has a limited 6th grade education and had difficulty understanding oral *and* written English. Thus, he must rely on the assistance of others to communicate with English-speaking people. Such assistance is particularly important in view of the charges in this case: alleged acts of disgraceful conduct with a female student.

In spite of the appellant's confusion about these charges and what he needed to do to contest them, from the time he received the notice of removal he diligently pursued his MSPB appeal rights. And, upon learning of his representative's failure to file the appeal several weeks after it was due, he began an immediate search for a new representative.

Mr. Goldtooth conducted this search under extremely difficult circumstances. In addition to his isolation caused by his language limitations and his lack of access even to telephone service, he lived some 2 hours away from the nearest town. Even a simple telephone call to a representative or to attempt to find a representative required approximately four hours round trip. The towns where legal counsel maintained offices were even farther away and entailed a drive of 2½ to 3 hours each way over dirt and paved roads. Despite these obstacles, Mr. Goldtooth persisted and retained counsel who filed his appeal--albeit 5 months later. I find that Mr. Goldtooth's good faith and persistent attempts to cooperate with the agency, respond to the charges and seek adequate representation combined with his isolation of geography, language, community and culture *and* the further aggravation of that isolation within his community by the notorious nature of the charges against him, constitute good cause to waive the filing deadline.

The errors of an appellant's chosen representative and an appellant's inability to find counsel do not *generally* establish good cause. *See Sofio v. Internal Revenue Service* 7 M.S.P.R. 667,670 (1981); *see also Defraaff v. Department of the Navy,* 55 M.S.P.R. 343, 346 (1992) I normally would find a five-month delay--even under adverse circumstances--to be too great to excuse an untimely appeal filing. However, Mr. Goldtooth's circumstances are so unique as to make his case *sui generis.*

Accordingly, some discretion must be exercised when applying general principles to Mr. Goldtooth's case. As the Board stated in *Alonzo,* 4 M.S.P.R. at 183-184, "'good cause' is an elastic concept. It entitles the employee to the application of broad equitable principles of justice and good conscience." (Citations omitted) the application of such principles requires that the Board's appeal process be open to all applicants on the same terms. Unalterable and unique circumstances beyond Mr. Goldtooth's control place him at a disadvantage in comparison with other appellants. Mr. Goldtooth's repeated effort to pursue his rights under such difficult circumstances not facing other appellants, warrant the exercise of the Board's discretion to find good cause for waiving the filing deadline.

_____ _____

DATE BETH S. SLAVET
Vice Chair

APPENDIX C - INITIAL DECISION OF THE MERIT SYSTEM PROTECTION BOARD

UNITED STATE OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JOHNNY GOLDTOOTH,
APPELLANT,

DOCKET NUMBER
DE-0752-95-0440-I-1

V.

DEPARTMENT OF THE INTERIOR,
AGENCY

DATE: July 21, 1995

Patterson V. Joe, Esquire, Flagstaff, Arizona, for the appellant.

Timothy Clani, Gallup, New Mexico, for the agency.

BEFORE

Gretchen W. Thomas
Administrative Judge

INITIAL DECISION

INTRODUCTION

On May 23, 1995, the appellant appealed his removal from the position of Motor Vehicle Operator, WG-6, effective November 18, 1994. The Board has jurisdiction over the appeal. 5 7.S.C. section 7511-7513 and 7701 (a).

For the reasons set forth below, the appeal is DISMISSED for untimely filing.

ANALYSIS AND FINDINGS

Timeliness

An appeal to the Board must be filed within 30 days of the effective date of the action appealed. 5 C.F.R. section 1201.22 (b). The date of filing is determined by the postmark date, or if personally delivered, by the date of receipt by the Board.

The record shows that the appellant was removed, effective November 18, 1994, but the appellant did not file his appeal until more than six months later on May 23, 1995. *See* Appeal File, Tab 1. Thus, the appellant's appeal was untimely.

The Board will waive the 30-day time limitation for filing where good cause is shown. To establish good cause, the appellant must show that he exercised diligence or ordinary prudence under the particular circumstances. *See Alonzo v. Department of the Air force*, 4 M.S.P.R. 180, 184 (1980). The appellant bears the burden of proof by a preponderance of the evidence on this issue. *See* 5 C.F.R. section 1201.56(a) (2) (ii).

On appeal,[2] the appellant, a Navajo Indian, affied that because he has a sixth grade education and limited understanding of the English language, he asked a relative, Peggy Scott, to complete his appeal form and write a cover letter to the Board. The appellant then contacted Benjamin Smith, Vice-BIA/National Federation of Federal Employees Council, to

---

[2] The appellant did not respond to the Board's Acknowledgment Order, affording him the opportunity to file evidence and argument on the timeliness of his appeal. Nor did the appellant respond to the agency's motion to dismiss.

assist him. Smith agreed to call the appellant in a few days to arrange a meeting. Smith instructed the appellant to bring his appeal form and letter to the meeting. Being unaware that be was to mail the appeal package to the Board, he accepted Smith's instructions. However, the appellant did not hear from Smith and after several unsuccessful attempts to contact him, Scott mailed smith the appeal form and letter on December 9.

After mailing the appeal, the appellant continued his efforts to contact Smith without success. Several weeks later, the appellant learned that his appeal had not be filed. He then contacted several attorneys to represent him. However, he was unsuccessful in retaining an attorney until the spring of 1995.

Based on a careful review of the evidentiary record, I find that the appellant has failed to meet his burden of establishing good cause for waiver of the Board's time limitations. There is basically no evidence that the appellant's limited education and lack of facility in English contributed to his untimely filing. The record show that the appellant, prudently and with due diligence, engaged Scott to complete his appeal form and write a cover letter to the Board. According to the appellant's affidavit, Scott mailed the appeal package on December 9, 1995, a date well within the Board's then applicable filing deadline.[3]

Rather, the record shows that the delay in filing was due to the apparent failure of the appellant's chosen representative, Smith, to file on his behalf and the appellant's subsequent inability to find another representative. But, the

---

[3] In July 1994, the Board amended its regulations to allow 30 days, rather than 20 days in which to file an appeal.

Board has consistently held that the appellant is responsible for the errors and omissions of his chosen representative. *See Pedrajas v. Office of Personnel Management,* 55 M.S.P.R. 667, 670 (1992);*Sofio v. Internal Revenue Service,* 7 M.S.P.R. 667,670 (1981). And, it is well-established that the inability to find a representative is insufficient to establish good cause. *See Degraaff v. Department of the Navy,* 55 M.S.P.R. 343, 346 (1992); *Williams v. Department of the Air Force,* 40 M.S.P.R. 427, 429 (1989).

Further, to the extent that Smith either misled the appellant about filing the appeal or the appellant misunderstood Smith's directions, I find that it does not suffice to establish good cause. Some weeks after forwarding the appeal package to smith, the appellant admittedly learned that his appeal had not be filed.

Yet, despite this knowledge, the appellant took no action to personally mail his appeal package to the Board's address appearing on the cover letter or to otherwise contact the Board for instructions as to how to proceed. The appellant apparently made no attempt to have Scott review either the agency's decision or the appeal package which she had prepared for instructions as to how to proceed. Nor did he attempt to ascertain from any other person with a command of English whether an address or telephone number for the Board appeared anywhere in his appeal materials. And, the record shows that had he done so, the appellant would have discovered not only the Board's address, but the name, address, and telephone number of an agency official from whom he could obtain information. *See* Appeal File, Tab 1 (E).

In sum, I find that after learning that smith had not filed his appeal, the appellant failed to exercise the diligence or

ordinary prudence necessary during the ensuing three to four months to establish good cause for his untimely filed appeal. *See Houghton v. Department of the Army*, 55 M.S.P.R. 682, 684 (1992). And, in the interest of judicial efficiency and fairness, the Board will not waive its timeliness requirements in the absence of good cause shown. *See Willis v. United States Postal Service*, 63 M.S.P.R. 618, 620 (1994).

Accordingly, I find that the appellant has failed to meet his burden under 5 C.F.R. section 1201.56(a) (2) (ii), of establishing good cause for waiving the time limit. *See Alonzo*, 4 M.S.P.R. at 184.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Gretchen W. Thomas
Administrative Judge

APPENDIX D - AFFIDAVIT OF JOHNNY GOLDTOOTH

AFFIDAVIT OF JOHNNY GOLDTOOTH

STATE OF ARIZONA)
) ss
County of Navajo)

Johnny Goldtooth, being first duly sworn and upon his oath, deposes and says:

1. That affiant is a member of the Navajo Nation and currently resides on the Navajo Indian reservation;

2. That affiant is currently 55 years of age, and that he was born and raised on the Navajo Indian reservation in northern Arizona;

3. That affiant has attained a sixth grade level education and has not completed any other grade level beyond the sixth grade level, and that as a result he has difficulty understanding written and oral English;

4. That affiant must on a regular basis rely on the assistance of others to read correspondence, complete employment applications and other forms;

5. That affiant has resided all of his life on the Navajo reservation where the predominant language spoken is Navajo, and that he has lived his life primarily in the Navajo tradition;

6. That affiant was employed at the Seba Dalkai

7. That affiant between October 4, 1993 and October 18, 1994 drove a 60 passenger school bus that was on loan from the Holbrook motor pool, and that this bus had a broadcast radio located on the rear left side of the driver's seat;

8. That affiant was driving the bus on October 4, 1994 when, Janice Yazzie, a 12 year old female student who was a passenger on the bus walked up to where affiant was seated, kneeled and leaned over affiant's lap, and began changing the channel on the radio;

9. That affiant then grabbed a hold of Ms. Yazzie's right shoulder, pulled her away from the radio and himself, and told her firmly not to walk around while the bus was moving and not to play with the radio;

10. That affiant slowed down the bus while he admonished Ms. Yazzie;

11. That Ms. Yazzie attempted to play with the radio for about three days, and that each time, affiant firmly told Ms. Yazzie to sit down and not walk around while the bus was in motion;

12. That between October 4 and 18, 1994, Kimberly Horsechief, another 12 year old female student who

13. That although affiant admonished Ms. Horsechief not to run around on the bus seats, Ms. Horsechief continued to do so while the bus was in motion;

14. That because of Ms. Horsechief's conduct, affiant stopped the bus on one of the days stated in paragraph 12 above, walked over to Ms. Horsechief, held her right arm and told her to sit down, and that Ms. Horsechief did not sit down;

15. That affiant then grabbed both shoulders of Ms. Horsechief and sat her down on the seat she was standing;

16. That on October 18, 1993, affiant was summoned to the principal's office;

17. That upon affiant's arrival at the principal's office, affiant was informed that Ms. Janice Yazzie and her mothers had complained that affiant had "touched" Ms. Yazzie;

18. That Dr. Calsoyas, the principal, then asked affiant if he had touched Ms. Yazzie, and that affiant answered in the affirmative because he had touched their shoulders or arms;

19. That affiant was not aware that when the principal said "touch", he meant touching the student on the breasts, hugging the student, or some other improper contact;

20. That affiant was then presented with a type written memorandum dated October 18, 1993 by the principal for affiant's signature;

21. That affiant was informed by the principal that the typed memorandum was for the purpose of reassigning affiant to facility maintenance duties;

22. That the principal also stated that he would help affiant find an attorney; that he had a lot of respect for affiant; and that all affiant needed to do was sign the October 18, 1993 memorandum;

23. That the principal then instructed affiant to stay away from all children and facilities where children stay;

24. That on May 9, 1994, Dr. Kyril Calsoyas, principal for the Seba Dalkai Boarding School, rated affiant's employee performance as a level 3 for the period from July 1993 to June 1994, and that a level 3 rating is interpreted by the Boarding School as "overall, performance is fully successful.";

25. That affiant received a letter dated September 6, 1994 from the principal informing affiant of the school's proposal to remove affiant from his position and to respond within 10 days;

26. That affiant then went to the National Federation of Federal Employees ("NFFE") representative for assistance, and that the NFFE representative informed him that the filing of a complaint was premature because affiant had not been terminated at that time;

27. That affiant then took no further action on the September 6, 1994 letter;

28. That affiant received another letter dated November 4, 1994 this time from Charles Johnson, Agency Superintendent for Education informing affiant that he was removed from his position as motor vehicle operator effective November 18, 1994;

29. That affiant then sought the assistance of a relative, Ms. Peggy Scott, to fill out the appeal form and to write a letter of appeal to the Merit System Protection Board ("MSPB") to appeal the November 4, 1994 removal letter;

30. That affiant's relative, Ms. Scott did in fact complete the MSPB appeal form and finalize the appeal letter on behalf of affiant;

31. That on or about November 14, 1994, Affiant spoke with Benjamin C. Smith; that Affiant was told on that day by Mr. Smith that he would call Affiant and meet with him in Keams Canyon, Arizona after November 18, 1994 and that at that time, Mr. Smith would pick up the completed MSPB appeal form and the appeal letter; that Affiant was not aware at that time that the proper procedure was to mail the appeal package to the Denver Regional Office of the MSPB;

32. That Affiant waited and waited for a call from Mr. Smith; and that Affiant and Ms. Peggy Scott made several phone calls to Mr. Smith in an effort to find out what to do with the appeal package; that Mr. Smith never returned any of the phone calls made by Affiant or Ms. Peggy Scott;

33. That Ms. Peggy Scott finally mailed both appeal documents plus other attachments to Benjamin C. Smith, a NFFE representative from Tuba City, Arizona;

34. That affiant's appeal materials were post-marked December 9, 1995 from Chinle, Arizona the residence of Ms. Peggy Scott, and that the 20 day appeal time expired on December 8, 1994;

35. That affiant's appeal package was received by Mr. Smith on December 13, 1994, and that Mr. Smith took no action on affiant's appeal package;

36. That affiant's appeal package was never mailed to the MSPB;

37. That after the appeal package was mailed to Mr. Smith, Affiant made repeated efforts for several weeks to contact Mr. Smith by telephone, but Mr. Smith did not return any calls to Affiant;

38. After the several weeks had gone by, Affiant learned that his appeal had not been filed.

39. Affiant then began searching for an attorney; that Affiant went to the DNA Peoples' Legal Service, Inc., and made an appointment; that Affiant was asked to return in about two or more weeks; and that when Affiant returned for his appointment, Affiant was informed that the person with whom he had the appointment was not available and that DNA could not take his case;

40. That on the same day of being informed by DNA that they could not take his case, Affiant then began searching for another attorney in Gallup, New Mexico to represent him in; that Affiant visited one or more attorney offices but was not successful in retaining an attorney for several more weeks.

41. That although Affiant has made due diligent efforts to retain an attorney to handle his case, he was not able to do so until the Spring of 1995.

42. That affiant has not had a meaningful opportunity to respond to the allegations that were leveled against him and his good character and reputation;

43. That affiant feels that he has been taken advantage of because of his limited education and that his character has been made to suffer as a result;

44. Further affiant sayeth naught.

Dated this ____ day of May, 1995.

_____

Johnny Goldtooth

TRANSLATOR'S CERTIFICATION

I, _____, speak and understand the Navajo language and can also read and understand the English language, and I have read the foregoing affidavit and translated it into the Navajo language for Johnny Goldtooth to the best of my ability this _____ day of May, 1995.

SUBSCRIBED AND SWORN to before me this _____ day of May, 1995 by Johnny Goldtooth.

_____

Notary Public

MCE: _____